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No. 04-83

In the Supreme Court of the United States

JIM GUY TUCKER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether petitioner was entitled to seek relief under Federal Rule of Civil Procedure 60(b) from the district court's denial of his collateral attack under 28 U.S.C. 2255, without first obtaining authorization from the court of appeals, under 28 U.S.C. 2244, to file a second or successive motion under Section 2255.

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OPINION BELOW

The order of the court of appeals (Pet. App. 1a) denying petitioner's motion under 28 U.S.C. 2244 is unreported.

JURISDICTION

The order of the court of appeals was entered on April 12, 2004. The petition for a writ of certiorari was filed on July 12, 2004 (Monday). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. A grand jury sitting in the Eastern District of Arkansas returned a three-count indictment against petitioner. In Count 3 of the indictment, petitioner was

charged with conspiring to defraud the United States for the purpose of impeding, impairing, obstructing, and defeating the lawful government functions of the Internal Revenue Service (IRS), in violation of 18 U.S.C. 371. Pet. App. 3a. Pursuant to a plea agreement, petitioner pleaded guilty to that count, and the government dismissed the first two counts. *Ibid.* On May 17, 1999, petitioner was sentenced to four years of probation, fined $6000, and ordered to pay $1 million in restitution. No. 4:95-CR-117, Docket Entry Nos. 316 and 320 (E.D. Ark. May 17 and 21, 1999).

2. On direct appeal, petitioner challenged the computation of the government's tax loss for purposes of his restitution order, arguing that "new Internal Revenue Code § 1374," rather than "old Internal Revenue Code § 1374," should apply to his case. Petitioner did not challenge his conviction on that basis, but he did argue that, because of this error, the district court had miscalculated the amount of restitution owed. A panel of the United States Court of Appeals for the Eighth Circuit vacated petitioner's sentence and remanded. *United States* v. *Tucker*, 217 F.3d 960, 966 (2000).

The court of appeals reasoned that an order of restitution must be made based on a finding of "actual loss," and that the United States' actual loss could not be determined without knowing whether, contrary to the IRS's stated enforcement policy, the IRS would have taken the position that the old version of Section 1374 applied to the transaction at issue. See 217 F.3d at 965. The court of appeals thus reversed the restitution order and remanded for further sentencing proceedings. See *id.* at 961, 966.

3. On remand, the United States agreed that "new Internal Revenue Code § 1374" should be used to determine the amount of restitution, and that the tax

loss was much less than originally calculated using old Section 1374. Pet. App. 19a. The parties entered a stipulation concerning the amount of restitution. *Id.* at 18a-21a. On December 10, 2003, an amended judgment was entered. No. 4:95-CR-117, Docket Entry No. 361 (E.D. Ark. Dec. 10, 2003). Neither party appealed from the amended judgment.

4. Before entry of the amended judgment, petitioner filed with the district court a "Motion To Vacate Sentence Under 28 U.S.C. § 2255," seeking to vacate his conviction and sentence on the ground that his indictment and plea had been premised on the applicability of the old version of Section 1374. Pet. App. 2a, 5a. The district court, noting that petitioner's probation had ended shortly after the filing of the motion, determined that there was sufficient cause to rule on the motion before a new restitution order was imposed. *Id.* at 5a-6a.

The district court held that petitioner's claims were "unquestionably procedurally barred." Pet. App. 8a. The court noted that petitioner had been long aware of which version of Section 1374 the government relied upon, and had, in fact, made that issue the focus of his appeal challenging the restitution order, but that petitioner had neither moved to set aside his plea nor contested his conviction on appeal. *Ibid.* The court also rejected petitioner's claims on the merits. *Id.* at 16a-17a. The district court issued a certificate of appealability, and petitioner filed a timely notice of appeal. No. 4:95-CR-117, Docket Entry Nos. 355 and 356 (E.D. Ark. Oct. 10 and 16, 2003).

5. During the pendency of petitioner's appeal from the denial of Section 2255 relief, petitioner filed in the court of appeals a motion styled "Motion Under 28 U.S.C. § 2244 for Permission to File Rule 60 Motion in

District Court" (Section 2244 Motion), along with a proposed motion under Federal Rule of Civil Procedure 60(b). Specifically, petitioner requested that the court of appeals "grant him permission to pursue Rule 60 relief in the District Court" and "that the appeal be held in abeyance while that is litigated in the District Court." Section 2244 Motion at 20. The proposed Rule 60 motion was premised on the fact that the government had, subsequent to the district court's order denying relief under Section 2255, agreed to use "New Section 1374" to calculate the amount owed in restitution. Petitioner's Section 2244 motion urged that this argument was an appropriate basis for a Rule 60 motion and that his motion did not constitute a second or successive motion under Section 2255. In the alternative, petitioner argued that the Rule 60(b) motion met the circumstances in which a second or successive challenge under Section 2255 is permitted. The United States informed the Eighth Circuit that it did not oppose petitioner being allowed to file his motion in the district court in the first instance. No. 03-3559, Docket Entry of Apr. 5, 2004 (8th Cir.).

On April 12, 2004, the court of appeals denied the motion without discussion and set petitioner's Section 2255 appeal for briefing. Pet. App. 1a. The Section 2255 appeal was fully briefed as of August 17, 2004.

ARGUMENT

1. Petitioner contends that the Court should grant certiorari to determine "whether the restrictions on filing of successor petitions found in 28 U.S.C. § 2244 apply to motions filed under Rule 60(b)" of the Federal Rules of Civil Procedure. Pet. 19. Petitioner states that "[t]he circuits are split in several different directions" on the question and that "[t]his Court granted

certiorari in a similar situation in *Abdur'Rahman* v. *Bell*, 535 U.S. 1016 (2002), but then dismissed the petition as improvidently granted. *Abdur'Rahman* v. *Bell*, 537 U.S. 88 (200[2])." Pet. 19 (citations omitted). This case, however, does not present the question initially accepted for review in *Abdur'Rahman*, and review is not warranted in any event.

a. The Court granted certiorari in *Abdur'Rahman* to review the Sixth Circuit's holding "that every Rule 60(b) Motion constitutes a prohibited 'second or successive' habeas petition as a matter of law." *Abdur'Rahman* v. *Bell*, 537 U.S. 88, 93 n.9 (2002) (Stevens, J., dissenting). The Court later dismissed the writ of certiorari as improvidently granted. *Id.* at 89.

Contrary to petitioner's characterization, this case does not present the question initially accepted for review in *Abdur'Rahman*—*i.e.*, whether "every Rule 60(b) Motion constitutes a prohibited 'second or successive' habeas petition as a matter of law," 537 U.S. 93 n.9—because the Eighth Circuit has not adopted that position. Rather, the Eighth Circuit expressly allows a district court to entertain a purported Rule 60(b) motion in post-conviction proceedings and to determine, in the first instance, whether the motion is, in fact, a second or successive application for relief that is subject to Section 2244's gatekeeper rule. See *Boyd* v. *United States*, 304 F.3d 813 (2002) (per curiam). In *Boyd*, the court "establish[ed] a uniform procedure throughout the Circuit," in which it "encourage[d] district courts, in dealing with purported Rule 60(b) motions following the dismissal of habeas petitions, to employ a procedure whereby the district court files the purported Rule 60(b) motion and then conducts a brief initial inquiry to determine whether the allegations in the Rule 60(b) motion in fact amount to a second or successive collat-

eral attack under either 28 U.S.C. § 2255 or § 2254." *Id.* at 814. The Eighth Circuit further instructed that, "[i]f the district court determines the Rule 60(b) motion is actually a second or successive habeas petition, the district court should dismiss it for failure to obtain authorization from the Court of Appeals or, in its discretion, may transfer the purported Rule 60(b) motion to the Court of Appeals." *Ibid.*

Petitioner did not file a Rule 60(b) motion with the district court, as *Boyd* contemplates. If petitioner believed his arguments were properly brought by way of a Rule 60(b) motion and not subject to the constraints of Section 2244, he could have followed the procedure set forth in *Boyd* and filed the purported Rule 60 motion in the district court in the first instance. If petitioner had done so, the district court would have had the opportunity to consider whether his arguments were cognizable under Rule 60(b) or whether petitioner was required first to obtain a certification from the court of appeals pursuant to Section 2244.

b. Review is also unwarranted because the panel did not explain the basis of its denial, and it is therefore impossible to state the precise holding of the panel. The Eighth Circuit may have concluded that, to the extent that petitioner believed his arguments were the proper subject of a Rule 60 motion, petitioner should have followed the process established in *Boyd*, rather than filing an unnecessary Section 2244 motion to the court of appeals. Similarly, the court of appeals may have viewed the motion as procedurally inappropriate because, as discussed below, pp. 8-9, *infra*, it was inconsistent with applicable Eighth Circuit procedures concerning treatment of Rule 60 motions during the pendency of an appeal from the underlying judgment.

Petitioner does not contend that technical procedural rulings of that sort would warrant further review by this Court.

Alternatively, the panel may have ruled on the merits of petitioner's Section 2244 motion after considering whether the arguments in the proffered Rule 60 motion would constitute a second or successive Section 2255 application, and, if so, whether the narrow circumstances in which a successive motion is permitted were met.* The latter determination, petitioner concedes (Pet. 23), would not be subject to review by way of a petition for writ of certiorari. See 28 U.S.C. 2244(b)(3)(E) ("The grant or denial of an authorization by a court of appeals to file a second or successive application shall not be appealable and shall not be the subject of a petition for rehearing or for a writ of certiorari.").

A decision on the threshold question whether a particular motion constitutes a second or successive Section 2255 motion to which Section 2244's gatekeeper process applies may, at least in certain circumstances, be reviewed by this Court. See *Castro* v. *United States*, 124 S. Ct. 786, 790-791 (2003). There is, however, no way to

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* A panel may certify a second or successive motion for relief under 28 U.S.C. 2255 only if the motion is found to contain:

> (1) newly discovered evidence that, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that no reasonable factfinder would have found the movant guilty of the offense; or
>
> (2) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable.

28 U.S.C. 2255.

know definitively whether the court of appeals made such a determination in this case.

2. The fact that petitioner's direct appeal from the denial of his initial Section 2255 motion was pending in the court of appeals at the time of his Section 2244 motion does not, as petitioner contends (Pet. 23), provide a further reason for certiorari. Rather, the fact that petitioner's direct appeal remains pending in the court of appeals provides an additional basis for denying review.

a. Petitioner contends that, even if Rule 60 motions in Section 2254 and 2255 cases are generally subject to the certification process set forth in Section 2244, that requirement should not apply where, as here, the initial denial of a Section 2255 motion is subject to review on direct appeal. Pet. 23-24. But the Eighth Circuit has not held that a Rule 60(b) motion may not be filed while an appeal from the denial of an initial Section 2255 motion is pending. Rather, as a general matter, in the Eighth Circuit, district courts *can* consider Rule 60(b) motions while the underlying judgment is before the court of appeals on direct appeal. When a judgment is on direct appeal, jurisdiction over the case is transferred to the court of appeals. See *Griggs* v. *Provident Consumer Disc. Co.*, 459 U.S. 56, 58 (1982). The Eighth Circuit has adopted a practice that allows the district court "to consider the [Rule 60] motion and if it finds the motion to be without merit to enter an order denying the motion, from which order an appeal may be taken. * * * If, on the other hand, the district court decides that the motion should be granted, counsel for the movant should request the court of appeals to remand the case so that a proper order can be entered." *Pioneer Ins. Co.* v. *Gelt*, 558 F.2d 1303, 1312 (8th Cir. 1977). See *Hunter* v. *Underwood*, 362 F.3d 468, 475 (8th

Cir. 2004) (same). Petitioner, however, did not avail himself of the opportunity to seek an indicative ruling from the district court on the proposed Rule 60 motion.

b. Finally, because petitioner's appeal from the denial of his Section 2255 motion is still pending, there remains the possibility that the court of appeals will accept the arguments that petitioner advances in his pending Section 2255 appeal. The question raised in the petition would thus be rendered moot. That possibility is yet another reason why this case is an unsuitable vehicle for resolution of any broad issue concerning the relationship between Rule 60(b) and the gatekeeper provisions in Section 2244.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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